Supreme Court, U.S.
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No. 01-918

IN THE
Supreme Court of the United States

VENETIAN CASINO RESORT, L.L.C.,
Petitioner,

v.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENT LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL T. ANDERSON
(*Counsel of Record*)
DAVIS, COWELL & BOWE, LLP
8 Beacon Street, 4TH Floor
Boston, Massachusetts 02108
(617) 227-5720

RICHARD G. MCCRACKEN
MCCRACKEN, STEMERMAN
BOWEN & HOLSBERRY
1630 S. Commerce St. A1
Las Vegas, Nevada 89102
(702) 386-5107

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Once a property owner has given up a permanent right-of-way for municipal sidewalk traffic, does it suffer a Fifth Amendment Takings when pedestrians exercise free speech rights on the thoroughfare?

CORPORATE DISCLOSURE STATEMENT

Respondent Local Joint Executive Board of Las Vegas is a committee of two local labor unions, Culinary Workers Union Local 226 and Bartenders Union Local 165. Local 226 and Local 165 are affiliated with the Hotel Employees & Restaurant Employees International Union and the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). The Unions have not issued shares, bonds or other securities.

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STATEMENT OF THE CASE

Respondent Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 and Bartenders Union Local 165, AFL-CIO (collectively, "the Union") incorporates the Ninth Circuit's statement of the case. App. 2a-4a.

Under Sup. Ct. Rule 15.1, we address the following misstatements in Venetian Casino Resort, LLC's ("the Venetian's") petition:

A. The Venetian Does Not Have Fee-Simple Ownership of the Sidewalk.

The Venetian describes the sidewalk simply as its "private property," as though it were not burdened by any public servitude. Petition at 4. The Venetian asserts as fact that its 1999 Agreement with the State did not dedicate any right-of-way to the public. *Id.*

This is not a record fact. This is a contention that the Ninth Circuit correctly rejected. App. 14a-17a.

1. The public's right of passage is a recorded encumbrance on the Venetian's title.

The sidewalk along Las Vegas Boulevard ("the Strip sidewalk") is subject to a permanent right of public passage. App. 8a, 14a-17a. The Agreement committing it to "unobstructed pedestrian access" is recorded against the Venetian's title. App. 15a, 22a, ¶5.

This public right runs with the land. The Agreement is binding in perpetuity on the Venetian's "heirs . . . successors, and assigns." App. 21a-22a. The public's right to use the sidewalk is permanent, no matter how the Venetian uses the rest of its property. App. 14a-17a. "Even if the Venetian were to close its doors . . . the public would still have the recorded right to pass along Las Vegas Boulevard . . ." App. 17a-18a.

2. The Venetian admitted below that it has given up its power to exclude outsiders from the sidewalk.

The Venetian now tells the Court that it did not compromise any private property right in the 1999 Agreement. Petition at 4-5. In particular, the Venetian claims it did not dedicate the sidewalk to public use. Petition at 24.

The Venetian's claim contradicts its admissions below, as the Ninth Circuit noted. App. 7a-9a. At hearing on the Venetian's motion for preliminary injunction, Venetian counsel conceded:

THE COURT: — So it's the Venetian's position that the — under the '99 agreement, the passageway or walkway has to be open for people to traverse from north to south. If — the Venetian —

[Venetian Counsel]
MR. DELLINGER: Yes, that is correct.

THE COURT: Even though it's their property, cannot prohibit people from crossing it back and forth. If simply if they choose or wish to exercise some form of — assert some kind of expression, carry their sign from the public —

MR. DELLINGER: Right.

THE COURT: — across the —

MR. DELLINGER: Right, right.

THE COURT: — area to the other public side they can't do that?

MR. DELLINGER: Right, exactly.

Union Supplemental Excerpts of Record in 9th Circuit ("9th Cir. SER") at 155: 12- 156: 1. In further colloquy, Venetian counsel reiterated this concession:

> THE COURT: [U]nder your theory, why couldn't the Venetian say . . . we have to grant access to go from north to south, they can cross our property, but by God, we're not going to let them wear T-shirts that we find offensive. . . What limits — are there any limits on what the Venetian could prohibit?
>
> MR. DELLINGER: Yes, I think the limits are, and the — and the Venetian is certainly aware of these, that it is allow pedestrian traffic. And that is, whatever is incidental to pedestrian traffic, they are to facilitate, they are not to block it. They're not to impose unreasonable prohibitions . . .
>
> THE COURT: Where does — where does the Venetian draw that in other words?
>
> MR. DELLINGER: I think you are — you are quite sharp in noting that the '99 agreement never says explicitly that pedestrian passage shall be allowed, but, you know, we are willing to concede that is implicit.

9th Cir. SER 159: 22- 160: 23. Venetian counsel later summarized:

> I feel comfortable in saying, that when you open up with Paragraph 1 which says that the company shall construct and maintain . . . a private sidewalk, and

> that the private sidewalk shall satisfy the ADA for purposes of providing unobstructed pedestrian access. . . it's not expressly stated, but it's inferred that pedestrians will have the right to pass by there.

9th Cir. SER 162: 14-21.

In subsequent briefing on cross-motions for summary judgment, the parties disputed whether the 1997 or 1999 Agreements was controlling, but the Venetian continued to admit that it was bound to allow pedestrian access: "The Venetian's consistent position throughout — including during the preliminary injunction hearing — has been that the *1999* agreement appears to contemplate that the Venetian would duly keep the walkway open for pedestrian access." 9th Cir. SER 201 n.9 (italics in original).

B. The Sidewalk Is Part of the Municipal Thoroughfare System.

The Venetian creates a misleading impression when it speaks of a "private sidewalk," as if it were only an internal walkway for the Venetian's patrons. It is not. It is a connecting part of Las Vegas' thoroughfare grid, in one of the busiest urban districts in America.

The record contains a videotape of the sidewalk, SER 213. As the Ninth Circuit described it,

> the sidewalk is the only means for pedestrians to travel north or south along the Venetian's side of Las Vegas Boulevard, a busy multi-lane artery . . . [T]here are no barriers or other physical boundaries to indicate to the steady stream of pedestrians making their way up and down the Las Vegas Strip that the sidewalk in front of the Venetian enjoys a different legal status than the public sidewalks to

> which it is seamlessly connected to the north and south.

App. 12a-13a.

C. The Venetian Has Never Claimed That the Relocation of the Sidewalk Was an Uncompensated Taking.

The Venetian confuses the issue when it complains that the courts have "convert[ed] the Venetian's private sidewalk into public property without payment of any compensation at all." App. 22a.

The Venetian has never claimed that the re-routing of the Strip sidewalk was itself an uncompensated taking. The government widened Las Vegas Boulevard at the Venetian's request, to facilitate its new mega-resort. Petition at 3-4; App. 2a-3a. The agreement to pave over the existing public sidewalk and relocate it ten feet further east was part of a fair exchange of considerations. The Venetian has never argued that the repositioning of the sidewalk inside its property line was an unreasonable condition for the government to place on the project. Such an argument would have been futile. *See Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) ("[I]f petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property or elsewhere.")

The Venetian's only complaint is that people on that sidewalk are allowed to speak freely. It seeks a federal injunction to suppress any expression that the Venetian does not authorize. App. 53a.

REASONS FOR DENYING THE WRIT

I. THIS CASE TURNS ON THE CONSTRUCTION OF A SINGLE CONTRACT.

The main dispute in this case was whether the 1999 Agreement between the State and the Venetian creates an enforceable right of public passage. Much of the Venetian's petition is simply a point-by-point quibble with the Ninth Circuit's construction of the Agreement. Petition at 23-29. This was the main focus of Judge Brunetti's dissent, App. 32a-38a (section titled "The Language of the 1999 Agreement.")

A grant of *certiorari* would require the Court to parse the individual provisions of the Agreement. Does the requirement of "unobstructed public access" of ¶1, App. 20a, refer only to the Americans with Disabilities Act (as the Venetian urges but the Ninth Circuit rejected, App. 16a)? Does ¶7, obligating the Venetian "dedicate necessary right-of-way and to construct thereon a sidewalk . . . adjacent to Las Vegas Boulevard should the private sidewalk be removed, altered or abandoned" signal that the present sidewalk is similarly dedicated, App. 15a, or does it only create a quasi-dedication triggered only if the Venetian actually exercises some dormant private right, as the Venetian claims?

This is not an issue of national significance. *Certiorari* review of this case would be little more than a specific exercise in contract construction.

II. THIS CASE PRESENTS NO NEW QUESTION OF CONSTITUTIONAL LAW.

A. This Is Not a State-Action Case.

The Venetian misses the point when it dwells on state-action jurisprudence defining who may be sued under 42 U.S.C. §1983. Petition at 11-20.

The Ninth Circuit's decision does not expand the definition of state action, because the Venetian is not being sued as a state actor. The Venetian is a Takings Clause *plaintiff*. It is suing for an extraordinary remedy: it wants the federal courts to enjoin local law enforcement to "take the affirmative steps of warning, citing, or arresting those who engage in First Amendment activity to which the Venetian objects." App. 53a.

The Venetian lost this case, not because it has such extraordinary power that it is a state actor, but because it has much *less* power than an ordinary landowner. The Venetian simply does not have the property right it seeks to enforce.

If the Venetian were an owner in fee simple, this case would be quite different. The right to exclude others is an "essential stick in the bundle of rights that are commonly characterized as private property . . ." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This is the property right successfully asserted against compulsory public access in Takings cases like *Kaiser Aetna, Dolan* and *Nollan v. California Coastal Comm.*, 483 U.S. 825, 831 (1987).

The normal property right to exclude is not in issue here, because the Venetian voluntarily gave it up. As a matter of law, pedestrians along Las Vegas Boulevard are not invitees of the Venetian. App. 17a-18a. Their use of the thoroughfare is grounded in an external public right that no longer depends on the Venetian's permission. App. 17a-18a. They have the right to speak freely, not because the Venetian is the government, but because foot traffic on the sidewalk is in the public domain. *Id.*

There is nothing novel about this result. Five years ago, this Court unanimously held that where an Indian tribe allows a highway through reservation land without reserving a gatekeeping right, it may not assert a landowner's right to regulate it. *Strate v. A-1 Contractors*, 520 U.S. 438, 455-456 (1997). "The Tribe's loss of right of absolute and exclusive use

and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others." *Strate*, 520 U.S. at 456, *quoting South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). This is true even though Indian tribes have much greater sovereignty over their land than ordinary property owners, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140-141 (1982). The Venetian is asking this Court to create a federal property right for non-Indians under the Fifth Amendment that this Court denies to sovereign Indian tribes. This would be an indefensible double standard.

B. The "Private Property" Label is Meaningless if It Conflicts with Reality.

The Venetian relies on the "private property" terminology inserted in various sections of the 1999 Agreement. Petition at 27-29. The Ninth Circuit followed the law when it held that this "private" label is meaningless if it masks the public nature of the servitude: "As the Supreme Court has recognized, simply declaring an entity to be private 'does not alter its characteristics so as to make it something other than what it actually is.'" App. 17a, *quoting Lebron v. National R. Passenger Corp.*, 513 U.S. 374, 393 (1995). The Venetian does not address *Lebron* nor the Ninth Circuit's application of it.

This is settled law. Just last Term, this Court reaffirmed *Lebron*: "[O]ur cases are unequivocal in showing that the character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies." *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 296 (2001) (*citing Lebron*.)

If pedestrian use is grounded in an external public right, any contrary labels in the 1999 Agreement "affected nothing but words." *Cf. Brentwood*, 531 U.S. at 301. If the public actually

has a recorded right of passage, the title "private sidewalk" does not change its legal character.

C. The Union May Defend Itself from an Unconstitutional Lawsuit Without Having to Show That the Plaintiff Is a State Actor.

The Venetian argues that private actors may not be restrained by the Constitution unless they are state actors, citing §1983 cases like *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). Petition at 16-17. This argument confuses the offensive use of the Constitution (*i.e.*, suing private defendants as state actors under §1983) with its defensive use against private plaintiffs who demand unconstitutional remedies.

The Venetian is suing to enjoin the Union, not vice versa.[1] The Union's right to assert a constitutional *defense* is broader than a §1983 plaintiff's right to bring its own federal action for violations "under color of state law." These are "two separate areas of inquiry." *Flagg Bros.*, 436 U.S. at 155-156. In this case, the Union need only show the first element – that the Venetian's requested relief would be unconstitutional. This does not require the Court to decide whether the Venetian is the government.

The clearest example is *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). This Court held that civil defamation defendants may raise a First Amendment defense, even though their opponents are not state actors. 376 U.S. at 265. *New York Times* rejected the argument that a libel plaintiff must be the

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[1]The Ninth Circuit's opinion contains a clerical error on this point. It identifies the Union as an intervenor below. App. 5a. In fact, the Union was originally sued as a named defendant from the inception of this case, and it was required to defend itself from the Venetian's motion for a preliminary injunction against union speech on the sidewalk. 9th Cir. ER 1. The Venetian acknowledges this point, Petition at 6.

government for the First Amendment to apply. *Id.* It was enough that the plaintiff sought judicial remedies that would have punished speech in the public domain. 376 U.S. at 265. This is the same outcome threatened here.

D. The "Public Function" Test Is Settled Law.

1. Municipal sidewalks are public fora, regardless of title.

The Venetian asserts that the "public function" of private property is irrelevant, unless the property owner is first established to be a state actor. It cites *dictum* in *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 123 (D.C. Cir. 1995) *rev'd in relevant part, Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 737 (1996) and *Chicago Acorn v. Metropolitan Pier & Exposition Authority*, 150 F.3d 695, 699 (7th Cir. 1998).

This general rule does not apply where property is dedicated to a core municipal function. The Venetian ignores *Evans v. Newton*, 382 U.S. 296, 298 (1966), where a park dedicated to public use was subject to the Constitution even though title had been transferred to private trustees. "Mass recreation through the use of the parks is plainly in the public domain [cit.om.]; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment." 382 U.S. at 302. "Public function" in this context did not depend on identifying the park trustees as owners of an entire company town. It was sufficient that the park was "municipal in nature." 382 U.S. at 301. This municipal-function rule applies to thoroughfare sidewalks, which are public fora "wherever the title . . . may rest." *Frisby v. Schultz*, 487 U.S. 474, 480-481 (1988), *quoting Hague v. CIO*, 307 U.S. 496, 515 (1939).

All nine Justices of this Court endorsed this aspect of *Evans* last Term in *Brentwood Academy*, 531 U.S. at 296 (majority),

see also id., 531 U.S. at 313 (Thomas, J. dissenting, joined by the Chief Justice, Scalia and Kennedy, JJ.) The majority cited *Evans* for the proposition that a nominally private entity may be a state actor when it is intertwined with governmental functions. 531 U.S. at 296. The dissenting justices' reading of *Evans*, although narrower, also embraced the "public function" rule relevant here:

> Our analysis [in *Evans*] rested on the recognition that the subject of the dispute, a park, served a "public function" much like a fire department or a police department. [Citing *Evans*] A park, we noted, is a "public facility" that "serves the community." *Id.* Even if the City severed all ties to the park and placed operation in private hands, the park still would be "municipal in nature," analogous to other public facilities . . ..

Brentwood, 531 U.S. at 313 (Thomas, J., dissenting).

The Venetian relies on lower court cases that deny public-forum status to private walkways only because they were not part of any municipal thoroughfare. Unlike the internal walkways of Chicago's Navy Pier in *Chicago Acorn*, which were "not through-routes [nor] part of the city's . . . transportation grid," 150 F.3d at 699, or the internal areas of shopping malls in *Stranahan v. Fred Meyer, Inc.*, 11 P.3d 228, 234 (Or. 2000) or *City of Jamestown v. Beneda*, 477 N.W.2d 830, 835 (N.D. 1991), the Strip sidewalk is a connecting piece of the City sidewalk system. It is not merely analogous to a public thoroughfare; it *is* a public thoroughfare.

Under this settled law, the sidewalk along the Las Vegas Strip is municipal in nature. It is part of the City's sidewalk system, and the public has a recorded right to use it as such. As the District Court held, "if ever there was a case where the protections of the First Amendment to the United States

Constitution should be applied to private property used for a particular public function, this is the case." App. 60a.

2. The divided decision in *S.O.C.* does not create a conflict.

The Venetian points to *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. Adv. Ops. No. 36, 23 P.3d 243 (2001) as a conflicting decision. Petition at 19-20.

In *S.O.C.*, the Nevada Supreme Court affirmed a preliminary injunction against pornographic commercial handbilling on a different part of the Las Vegas Strip sidewalk. The Nevada Supreme Court in *S.O.C.* was equally divided 3-3 on the issue relevant to this case – whether private land subject to a public right of passage is a public forum for First Amendment purposes. *Compare* plurality, 23 P.3d at 247-251 (Young, J., joined by Agosti and Becker, JJ.) *with id.* at 252 (Maupin, J., joined by Shearing J., concurring in the result) and *id.* at 254 (Rose, J., dissenting).

In disagreement with the three-justice plurality, the concurring Justices Maupin and Shearing and dissenting Justice Rose agreed with the U.S. District Court in *Venetian Casino Resort* that such a sidewalk is a public forum for First Amendment purposes. *See* 23 P.3d at 252 (concurrence); *id.* at 253-254 (dissent.) Justices Maupin and Shearing concurred in the judgment only because the pornographic handbills in *S.O.C.* were commercial speech, deserving less First Amendment protection than the labor speech in *Venetian Casino Resort*. 23 P.3d at 252.

The three-justice plurality opinion in *S.O.C.* is not an authoritative statement of a conflicting rule. Since the concurring justices' votes were necessary to create a majority in *S.O.C.*, the holding must be confined to the position of those justices who concurred on the narrowest grounds. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 765

n.9 (1988), *citing Marks v. United States*, 430 U.S. 188, 193 (1977). In Nevada, positions taken by only half of the participating justices are not binding law where they did not gain the support of a majority of the court. *See Forrester v. Southern Pacific Co.*, 36 Nev. 247, 281, 134 P. 753, 763 (1913), *cited in Craigo v. Circus-Circus Enterprises*, 106 Nev. 1, 22 n.7, 786 P.2d 22, 35 n.7 (1990) (Springer, J. concurring.)

In any event, *S.O.C.* involves sidewalks with different physical characteristics than this case, *see* 23 P.3d at 245 (describing wooden-plank sidewalk "elevated several feet off the ground and . . . separated from Las Vegas Boulevard by a public sidewalk that runs parallel to the plank sidewalk . . ."). A comparison between the properties in *S.O.C.* and this case would be a fact-specific exercise, not appropriate for *certiorari* review.

CONCLUSION

For these reasons, Respondent Local Joint Executive Board of Las Vegas respectfully urges that this Honorable Court deny the Petition.

Respectfully submitted,

Michael T. Anderson
(*Counsel of Record*)
DAVIS, COWELL & BOWE, LLP
8 Beacon Street, 4th Floor
Boston, Massachusetts 02108
(617) 227-5720

Richard G. McCracken
MCCRACKEN, STEMERMAN
BOWEN & HOLSBERRY
1630 S. Commerce St. A1
Las Vegas, Nevada 89102
(702) 386-5107